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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

MODERN RULES OF PROCEDURE FOR THE ISSUANCE OF ADVISORY OPINIONS IN NATURE OF SERVICE PROCEEDINGS	Docket No. RM2012-4

UNITED STATES POSTAL SERVICE REPLY COMMENTS
(August 28, 2013)

The Commission has received comments in this proceeding from five commenters (besides the Postal Service) representing a broad array of stakeholders in proceedings under 39 U.S.C. § 3661 ("N-cases"): business mailers, other industry stakeholders, an individual consumer, and the Public Representative.[1] Several points made by commenters have merit, although the Commission would do well to decline to adopt other points and recommendations.

I. Points of Agreement

The Postal Service supports several of the other commenters' remarks on the proposed rules in Order No. 1738.

- The Commission should provide more specificity around the circumstances that would furnish "good cause" for extending the 90-day timeframe for N-cases. Compare PR Comments at 14 with United States Postal Service Initial

[1] Initial Comments of the Greeting Card Association (hereinafter "GCA Comments"), PRC Docket No. RM2012-4 (July 29, 2013); Comments of National Newspaper Association, Inc. (hereinafter "NNA Comments"), PRC Docket No. RM2012-4 (July 29, 2013); Comments of David B. Popkin (hereinafter "Popkin Comments"), PRC Docket No. RM2012-4 (July 29, 2013); Public Representative's Comments (hereinafter "PR Comments"), PRC Docket No. RM2012-4 (July 29, 2013); Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Initial Comments on Notice of Proposed Rulemaking (hereinafter "Valpak Comments"), PRC Docket No. RM2012-4 (July 29, 2013).

Comments (hereinafter "USPS Initial Comments"), PRC Docket No. RM2012-4 (July 29, 2013), at 25-27.

- The Commission should prevent associational parties from circumventing the 25-interrogatory limit. Compare GCA Comments at 2 n.1 with USPS Initial Comments at 32-35.

- Insofar as N-case schedules allow time for Commission information-gathering or party discovery about the Postal Service's direct case, they should also allow time for information-gathering or party discovery about rebuttal cases. Compare PR Comments at 19, 24 with USPS Initial Comments at 18-22, 35-39.

- In the interest of fairness and in recognition of N-cases' purpose (that is, to examine whether a Postal Service proposal conforms to the policies of Title 39, U.S. Code), the Commission's rules should afford the Postal Service substantially more space to make its case in briefs than that afforded to other parties. Compare PR Comments at 30 with USPS Initial Comments at 44-47.

- The proposed change in computation-of-time rules would be unduly burdensome or merely lead to delayed responses. Compare NNA Comments at 6; Popkin Comments at 3; PR Comments at 18 with USPS Comments at 48-49.

- The proposed shortened deadlines for discovery and motion responses would pose severe difficulties for parties and probably would not produce any real

expedition in the discovery process. Compare NNA Comments at 6; Popkin Comments at 2; PR Comments at 18[2] with USPS Comments at 8-12, 31.

The Postal Service agrees with several other points and suggestions that other commenters have made. For example, the Greeting Card Association (GCA) rightly points out that "the traditional trial-type hearing model used in [N-cases] may not be the one best adapted to current needs." GCA Comments at 1. Indeed, the modernization of N-cases should mirror, to the greatest extent possible, the modernization of other Commission proceedings since the Postal Accountability and Enhancement Act of 2006 (PAEA). Since the implementation of that law, the Commission has replaced the old ten-month, trial-type rate cases with streamlined notice-and-comment proceedings that last only two to three months at most. Perhaps the most significant contributor to this shift has been the transition away from party discovery akin to that in civil trials and toward the routine gathering of information through Commission (and Chairman) information requests. Such a practice is well within the accepted bounds of agency practice under 5 U.S.C. §§ 556 and 557 as well, see USPS Initial Comments at 12-18, and so there is no impediment to the Commission using it to "adapt[N-cases] to current needs."

[2] While the Postal Service agrees with the Public Representative to that limited extent, however, the Public Representative's proposed solutions – that is, giving the Postal Service more time to file a motion to be excused from answering discovery and allowing a one-day grace period before a party must file a motion for late acceptance – would merely fine-tune the Commission's shifting of deadline goalposts. They would not address the root problem: so long as the Commission maintains liberal party discovery, it will continue to be a drag on N-case timeframes, no matter whether a party is nominally late for a deadline. As the Postal Service has explained, see USPS Initial Comments at 12-18, the Commission can avail itself of a ready-made solution to this central problem, with ample support in case-law and federal agency practice under the same Administrative Procedure Act (APA) provisions that govern N-cases. The Commission should channel routine information-gathering through Commission information requests, as it does in almost all other proceedings, and reserve party discovery only for those exceptional instances where constitutional due process rights might truly be at stake.

The Postal Service also agrees with GCA that N-case participants should be allowed to file a separate petition for a public inquiry into subjects that the Commission's proposed rules would bar from N-cases, such as alternative proposals to the service change at issue in a given N-case. GCA Comments at 7-8. Of course, anyone is already free to petition or prompt the Commission to open a public inquiry at any time, just as anyone can petition the Commission to initiate a rulemaking, even without explicit provision in the Commission's rules.[3] Thus, there is no basis for concern that N-case participants will lack a procedural avenue to suggest a public inquiry or special study into alternative service change concepts. See PR Comments at 32.

The Public Representative proposes that the Commission affirm that oral argument[4] is not available in N-cases. PR Comments at 16. Oral argument has not traditionally been a part of N-cases, and so this proposal would not result in any real streamlining of the status quo. Nonetheless, since N-case participants evidently have not had much use for oral argument, it would not hurt to take oral arguments expressly off the table and thus avoid any delay that they could theoretically add to a future N-case.

The Postal Service also agrees with the Public Representative that the Postal Service, as the proponent of a service change proposal, should be entitled to file a

[3] See, e.g., Order No. 1753, Order Revising Benchmark Used to Calculate the Costs Avoided by Automation First-Class 5-Digit Letter Mail, PRC Docket No. RM2012-6 (June 18, 2013) (adopting changes to periodic reporting rules as requested in Pitney Bowes's petition for rulemaking); Order No. 1678, Notice of Proposed Rulemaking Requesting Comments on Proposed Commission Rules for Determining and Applying the Maximum Amount of Rate Adjustments, PRC Docket No. RM2013-2 (Mar. 22, 2013), at 4 (acknowledging that the proceeding addresses concerns in the Postal Service's petition for rulemaking in Docket No. RM2011-2).

[4] The Public Representative's suggestion presumably pertains only to oral argument and not necessarily to oral hearings or oral cross-examination.

surrebuttal case as a matter of right, and not only upon convincing the Commission (or Presiding Officer) that exceptional circumstances warrant permission for a surrebuttal case. PR Comments at 28. The Public Representative correctly points out that the Postal Service bears the burden of proof as to the merits of its service change proposal, 5 U.S.C. § 556(d), and therefore "deserves greater leeway" in terms of opportunities to persuade the Commission of the merits of that proposal. PR Comments at 19. Surrebuttal is just such an opportunity, as it allows the Postal Service to correct, using its own expert testimony, inaccurate or misleading aspects of testimony put forward by its proposal's detractors. Limiting the Postal Service's ability to present such testimony could deprive the Commission of important insight about service change proposals, and it could hinder the Postal Service's ability to shoulder its burden of proof.[5] Instead of the motions practice for surrebuttal cases in the proposed rules, the Commission could use the same notice-of-intent model that it proposes for rebuttal cases. This would have the added benefit of freeing up two days in the procedural schedule, as surrebuttal would be preceded merely by a notice and not by a motion requiring extra time for other parties to file answers.

[5] It seems odd and arguably unfair for a party who filed potentially inaccurate or misleading rebuttal testimony to get a chance to convince the Commission (via an answer to the Postal Service's or other would-be surrebuttal filer's motion for leave) to deny the Postal Service (or other surrebuttal filer) a chance to set the record straight. After all, the proposed rules would not give the Postal Service a comparable opportunity to argue against letting other participants file rebuttal testimony critical of its service change proposal. This disparity seems all the more lopsided when one considers, again, that the Postal Service is the party with the burden of proof.

II. Points of Disagreement

In spite of these areas of agreement, the Postal Service respectfully finds that some of the other commenters' views and proposals would raise more problems than they would solve.

A. Notice of Pre-Filing Conference

The Public Representative believes that a requirement that the Postal Service notify all "potentially affected persons" about an impending pre-filing conference would be too vague. PR Comments at 8. It is fortunate, then, that the proposed rules do not contain any such requirement. Proposed Rule 3001.81 would not make the Postal Service responsible for personally contacting anyone; the Postal Service would simply have to file a notice with the Commission, which, in turn, would publish a public notice in the *Federal Register*. Moreover, proposed Rule 3001.81 would require "interested persons," not "potentially affected persons," to have an opportunity to give feedback. Taken together, these two aspects of proposed Rule 3001.81 prevent the very problems that the Public Representative imagines: everyone would receive constructive notice via the Commission filing and the *Federal Register* notice, and parties can determine for themselves whether they are sufficiently "interested" to offer feedback at a pre-filing conference. There would be no need under the proposed rules to scour the land for all persons who might be "potentially affected" or to fear that some such person has been overlooked.[6]

[6] The lone occurrence of the phrase "potentially affected persons" in Order No. 1738 does not contradict this. The Commission used that phrase in the section-by-section analysis of proposed Rule 3001.81 solely to describe the scope of persons with whom the Postal Service would be "require[d] to engage in discussions." Order No. 1738, Notice of Proposed Rulemaking Regarding Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. 3661, PRC Docket No. RM2012-4 (May 31, 2013), at 25.

Besides lacking a problem in the first place, the Public Representative's solution is ill-fitting. The Public Representative proposes that the Postal Service provide some form of actual notice about the pre-filing conference to all participants in the past five N-cases, all post-PAEA rate cases, and all post-PAEA complaint cases. It is unclear, however, why a party's role in a past N-case would indicate that the party has an interest in (or would be "potentially affected" by) a later, unrelated service change. Even less clear is why a party that has participated only in rate proceedings (such as Time Warner or L.L. Bean) or that has only filed an individualized complaint (such as Capital One or Gamefly) should be personally invited to confer about a nationwide service change, when those parties have never participated in an N-case before and may have no ascertainable interest in the one at hand. A far more workable solution, without guesswork or proxies, is the one that the Commission has already outlined: issue a public notice and let all participants decide for themselves whether they are sufficiently interested in the service change at issue.

B. Conditional Acceptance Phase

The Public Representative also proposes that the Commission scrap its proposed pre-filing phase in favor of a "conditional acceptance" phase within an official, docketed, Commission-overseen proceeding, yet not counting toward the 90-day clock. PR Comments at 10-11. If adopted, however, this suggestion would be a step backward vis-à-vis the Commission's goals in this rulemaking. The Postal Service

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Naturally, those "interested persons" who choose to attend a pre-filing conference upon receiving notice are almost certain also to be "potentially affected" by the service change at issue. The cited sentence in Order No. 1738's section-by-section analysis says nothing in connection with how service is to be provided or even whether discussions must be held with every "potentially affected person," much less anything that casts doubt upon the plain meaning of the proposed rule's text.

supports the Commission's proposed pre-filing process because it would build upon the pre-filing discussions that the Postal Service already conducts with interested stakeholders, while recognizing that these consultations can reduce the need to spend time in formal proceedings (particularly in the information-gathering phase). See USPS Initial Comments at 7-8; Order No. 1738 at 14. In contrast, the Public Representative's proposal to conduct everything, including party discovery, within an official, Commission-overseen proceeding of potentially indefinite duration, and then running a 90-day clock only at a later point in the process, represents little, if any, improvement over the way that N-cases work under the current rules. The nominal 90-day timeframe would risk becoming little more than a fig leaf for the status quo.

The Public Representative draws inspiration from the International Trade Commission's (ITC's) use of a pre-institution (what the Public Representative calls "conditional acceptance") phase for unfair import complaint proceedings under 19 U.S.C. § 1337 (also known as "Section 337 investigations"). PR Comments at 11. This analogy is inapt, however. The ITC has an interest in ensuring that it does not invest administrative resources in adjudicating a trade complaint that has little evidence to support it. Therefore, it makes sense that the ITC would conduct a preliminary investigation of the available evidence, in order to decide if further formal proceedings are warranted.[7] One might analogize this to the use of a grand jury as a preliminary test of whether a prosecutor's evidence is sufficient to merit an indictment and full criminal

[7] See Revisions of Rules Pertaining to Investigations of Unfair Practices in Import Trade, 49 Fed. Reg. 46,123, 46,124 (Nov. 23, 1984) ("Included among the reasons why the [ITC] may determine not to institute an investigation is failure to state a cause of action cognizable under section 337. … The pre-institution investigation is for the purpose of determining if the complaint states a cause of action that is cognizable under section 337 and if there is a likelihood that information may be developed during an investigation that could support a claim of a violation of section 337.").

trial. In the postal regulatory context, the ITC's Section 337 pre-institution stage is most comparable to proceedings on a motion to dismiss at the outset of a Section 3662 complaint case or Section 404(d) Post Office closing or consolidation appeal before the Commission. The only difference is that that motion-to-dismiss practice is "negative" – the Commission conducts full proceedings on the complaint or appeal, as a default, unless the Postal Service argues for dismissal and succeeds – whereas ITC Section 337 investigations and certain criminal trials cannot proceed until after the pre-institution or grand jury stage, respectively.

The interests involved in whether the ITC adjudicates a Section 337 complaint have little to do with why it makes sense for the Postal Service to discuss a proposed service change with other stakeholders before initiating a formal advisory opinion proceeding. In an N-case, the party being regulated (the Postal Service) is subjecting its own business plans to regulatory scrutiny; the Postal Service is not being dragged against its will into an adversarial proceeding, as with a party whose imports become the subject of a third party's Section 337 complaint to the ITC. Therefore, there is no need for the Commission to explore and resolve opposing contentions as to whether proceedings are worthwhile. The context for the ITC's pre-institution phase simply does not apply to N-cases.

The Commission's proposed rules surrounding pre-filing conferences introduce few, if any, problematic elements over current practice, and they certainly do not warrant a virtual continuation of the pattern of indefinite N-cases.

C. Resetting the 90-Day Clock

Valpak Direct Marketing Systems and the Valpak Dealers' Association (collectively, Valpak) urge the Commission to punish any alleged incompleteness or significant modification to the Postal Service's service change proposal with a wholesale resetting of the 90-day clock. Valpak Comments at 5. Even if such a drastic remedy might arguably be appropriate in certain cases, however, a categorical rule would cut too broadly. A categorical rule could lead to absurdly disproportionate results, where a relatively insignificant infraction or oversight results in substantially greater delay of the review of a pressing multi-billion dollar initiative.[8] The Commission's proposed rules already recognize that the Commission has the discretion to determine if sufficient good cause exists to extend the procedural schedule in a manner that would have the same effect that Valpak proposes, or if some less severe remedy is appropriate under the circumstances. While, again, the Postal Service agrees with the Public Representative that the Commission should put "good cause" into clearer focus, the Commission is right in its inclination toward a case-by-case approach to schedule deviations.

D. Follow-Up Interrogatories

The Greeting Card Association (GCA) and National Newspaper Association (NNA) take issue with a limit of 25 interrogatories, be they initial or follow-up questions. Both commenters would prefer that follow-up questions be unlimited, although GCA recommends that the Commission require a proponent to request and receive leave before filing follow-up questions. GCA Comments at 2, 5; NNA Comments at 6. GCA

[8] The absolute nature of Valpak's proposed remedy could also lead to increased litigation over what is or is not a "significant" modification. The Commission can mitigate this risk by maintaining its discretion to determine what extension might befit a given modification, as it proposes to do in Rule 3001.80(c).

and NNA do not account for the obvious downside of this proposal: creating one more escape hatch for unlimited party discovery would move N-cases even farther from the goal of a predictable 90-day framework, which is a vital aspect of the proposed rules to which the Commission must adhere in order to truly modernize the existing N-case process.[9]

Indeed, GCA's proposal for motions practice on follow-up interrogatories – while eminently more sensible than NNA's proposal, as discussed later in this section – could consume ten additional days of an N-case schedule, assuming that no follow-up interrogatories give rise to disputes requiring further resolution. GCA Comments at 2.[10] This would require compromising the Commission's proposed 90-day schedule, instituting even shorter deadlines elsewhere in the procedural schedule, or else accepting only twelve days for post-brief deliberation in N-cases with surrebuttal. See USPS Initial Comments at 38 (showing that 90-day N-case model with party discovery on direct and rebuttal cases and with motion for leave to file surrebuttal would leave 22 days for post-brief deliberation).[11] As if the proposed rules' approach to party discovery does not already leave enough opportunity to unreasonably burden the Postal Service

[9] As the Postal Service has already explained, while it is not impossible to attain, a 90-day timeframe is not as easy to achieve so long as the Commission chooses to keep party discovery as first resort, rather than a last resort, in N-cases. USPS Initial Comments at 9-18.

[10] GCA's proposal could also multiply the complexity involved in scheduling N-cases. The Commission's *pro forma* schedule might need to include even more variants for when hearings will take place, depending not only on the presence or absence of rebuttal and surrebuttal cases, but also on the presence or absence of a follow-up discovery phase regarding either the direct case or rebuttal cases or both. As mind-boggling as this might seem, GCA's proposal at least has an advantage over NNA's proposal in that GCA's would have a discrete period for follow-up questioning, whereas discovery would be indefinite under NNA's.

[11] In this statement, as in its initial comments, the Postal Service assumes that the Commission maintains its proposal for motions practice in advance of surrebuttal cases. As discussed in section I above, the Commission could free up an additional two days if it were instead to allow parties to file surrebuttal cases upon a notice of intent.

(and to threaten the certainty of the proposed rules' own 90-day schedule),[12] GCA and NNA would prefer that the burdens of party discovery be expanded. Proposals like this only raise the risk that N-cases will revert back into their familiar, unsustainable routine. The path to the Commission's goals of timeliness, clarity, and relevance is paved with less, not more, party discovery.

The proposed rules' own apparent model, Federal Rule of Civil Procedure 33(a)(1), limits interrogatories to 25 (including all discrete subparts), without distinguishing between initial and follow-up questions. Neither GCA nor NNA explains why N-case participants cannot simply ration their interrogatories in the same manner that parties to federal civil actions have been required to do for the last 20 years.[13] Of course, to the extent that one might argue the role of party discovery in N-cases to be incomparable to its role in federal civil actions, one would think that the comparison should cut the other way. If anything, party discovery should be less liberal in an N-case, which results only in an advisory opinion, than in a civil action, which results in a binding order that directly affects parties' rights.[14]

In the event that the Commission believes party discovery to be necessary or advisable in N-cases (although it is neither) and finds some merit in GCA and NNA's recommendation for unlimited follow-up interrogatories (although there is little), GCA's approach would appear to be the more rational one of the two. Under the Federal

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[12] See USPS Initial Comments at 10-11.

[13] The 25-interrogatory limit was added to the Federal Rules of Civil Procedure in 1993. See FED. R. CIV. P. 33(a) advisory committee's note.

[14] Indeed, under the U.S. Constitution, federal courts can only act to redress actual or impending injuries and cannot offer advisory opinions simply to aid parties mulling their own decision. E.g., Chafin v. Chafin, __ U.S. __, 133 S. Ct. 1017, 1023 (2013).

Rules of Civil Procedure, a court may grant leave for a party to go beyond its 25 allotted interrogatories "to the extent consistent with" various requirements: that discovery not be unreasonably cumulative or duplicative; that the information sought not be available from a more convenient, less burdensome, or less expensive source; that the proponent not have had ample opportunity to obtain the information through earlier discovery; and that the burden or expense of the proposed discovery not outweigh its likely benefit, in light of various circumstantial factors. FED. R. CIV. P. 26(b)(2), 33(a)(1). This approach reflects a sense of balance. Parties should have some basic ability to ask questions of one another; after a certain point, however, the risk of irrelevance, harassment, and undue burden becomes palpable enough that a proponent should have to affirmatively convince the tribunal that the benefits of further inquiries outweighs their costs.[15] In addition to the limiting language that GCA proposes (the answers to the original interrogatory must be non-responsive, incomplete, or ambiguous, and the follow-up interrogatory must not expand the scope of the initial interrogatory), any provision for follow-up questions beyond the 25 allotted interrogatories should require a proponent to persuade the Commission (or Presiding Officer) that the follow-up questions are not cumulative, duplicative, or unduly burdensome, do not seek information already available elsewhere, and so on, along similar lines to the Federal Rules standard.

[15] See FED. R. CIV. P. 33(a) advisory committee's note ("[B]ecause the device [that is, interrogatories] can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries. . . . [L]eave to serve additional interrogatories is to be allowed when consistent with Rule 26(b)(2). The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device.").

As discussed earlier in this section, however, even GCA's more moderate proposal would work against, not toward, the Commission's goal of more timely, relevant, and modern N-cases. The more intricate and party-driven that the Commission allows the mechanisms for information-gathering to remain, the further the Commission's goal of timely, modern, relevant N-cases recedes into reverie. It would be simpler and more effective to channel information-gathering through Commission information requests, a method readily available to the Commission under the APA. See USPS Initial Comments at 14-18.

E. Requests for Production Tied to Interrogatories

The Public Representative argues that the Commission's proposed rules inappropriately conflate requests for production of documents with interrogatories that request the production of data, and so the Public Representative proposes to turn the latter category into a separate (and uncapped) new species of N-case discovery. PR Comments at 21-25. This is another solution in search of a problem. Proposed Rule 3001.88 clearly covers requests for the "production of documents," without exclusion of electronic documents. Independent references to "things" or "items" do not affect the proposed rule's ability to apply to requests for documents in the form of electronic data.

As the Public Representative notes, id. at 24, courts have also dealt with interrogatories that seek the production of data. While recognizing that such interrogatories are essentially "fugitive request[s] for production of documents [that] would be better served in that format," Kendall v. GES Exposition Servs., Inc., 174 F.R.D. 684, 686 (D. Nev. 1997), federal courts have nonetheless taken proponents' designations at face value and treated them as discrete interrogatory questions that

count toward the 25-interrogatory limit. E.g., Smith v. Café Asia, 256 F.R.D. 247, 254 (D.D.C. 2009) (citing Banks v. Office of the Senate Sergeant-at-Arms, 222 F.R.D. 7, 10 (D.D.C. 2004), for the holding that "an interrogatory asking for information about something and a request for documents relating to the subject are two separate inquiries" that should count as discrete interrogatories); accord Superior Communs. v. Earhugger, Inc., 257 F.R.D. 215, 218 (C.D. Cal. 2009). These cases and their progeny appropriately place the onus on discovery proponents to be clear about what type of question they are asking, lest their requests for production count against their interrogatory allotment. There is no indication that this approach would serve the Commission and N-case participants any less well, assuming that the Commission keeps party discovery in N-cases.

F. Suspension of 90-Day Clock for Surrebuttal

Valpak proposes that the filing of surrebuttal testimony suspend the 90-day N-case schedule. Valpak Comments at 9. Valpak would essentially force the Postal Service to choose between "having the last word" and "want[ing] a quicker decision." Id. Valpak's proposal is more problematic than its Solomonic trappings let on.

First, while surrebuttal testimony may "be filed almost exclusively by the Postal Service," id. (emphasis added), other parties might also file surrebuttal testimony.[16] If an intent to file surrebuttal testimony can toll the 90-day clock, then the Postal Service's achievement of its supposed desire for a "quicker decision" is subject to the whims of third parties who might not share that desire. Yet if Valpak's proposal were narrowed to

[16] It is not inconceivable that Valpak itself could find itself inclined to offer surrebuttal testimony in a future N-case, given Valpak's history as an avowed supporter of the Postal Service's position in past N-cases. See id. at 2, 4.

the Postal Service's filing of surrebuttal testimony, and not that by other N-case participants, this would raise the same questions of procedural fairness discussed below.

Second, Valpak's proposal misses the point that the Postal Service, too, has APA rights. As a party before the Commission, the Postal Service is entitled "to submit rebuttal evidence." 5 U.S.C. § 556(d). Moreover, because the Postal Service is the proponent of an N-case request whose service change proposal is under scrutiny, the Postal Service bears the burden of proof, id., and so "deserves greater leeway" in terms of opportunities to persuade the Commission of the statutory conformity of that proposal. PR Comments at 19. Given the Postal Service's unique posture, it would be unfair to demand a cost for the Postal Service's exercise of its APA right and its decision not to let potentially ill-founded rebuttals go unanswered before the Commission, as discussed in section I above.

G. Field Hearings

NNA spends most of its comments decrying "the effect that a shortened review period would have upon the time available for field hearings." NNA Comments at 1-5. NNA apparently believes that the paramount goal of an N-case is not to develop a written advisory opinion on the basis of an evidentiary record, see 39 U.S.C. § 3661(c), but rather to provide "a more approachable physical environment than a D.C. hearing room" and "a less-intimidating procedural atmosphere, where citizens (as opposed to Washington lawyers) dominate the discussion," not to mention to "stimulate local news coverage." Id. at 3-4. NNA's fixation on field hearings leads it to imagine them as the heart of an N-case, which then demands accommodation for logistics, publication, travel

time, and so forth, id. at 5, and ultimately drives all other aspects of an N-case schedule.

Whatever the general merit in encouraging public input and transparency, NNA appears to be unfamiliar with the statutory framework within which N-cases operate. In enacting 39 U.S.C. § 3661, Congress required the Commission to base its advisory opinion on a formal record, consisting of evidence tested by cross-examination and briefing. The APA envisions alternative, less formal approaches to agency proceedings, see 5 U.S.C. § 553 (establishing notice-and-comment process for rulemakings for which Congress has not required a hearing on the record), yet Congress chose the formal route for N-cases. This means that the Commission cannot base its advisory opinion on statements that are not subject to adversarial testing for relevance and reliability. The Commission's current and proposed N-case rules properly reflect this, in that they allow the public to submit informal expressions of views that nevertheless do not serve as record evidence unless subjected to appropriate procedural safeguards. 39 C.F.R. § 3001.20b.

Unless NNA is proposing that field hearings be conducted with cross-examination and other procedural safeguards for the taking of record evidence (which NNA does not appear to be), then no statement in a field hearing can legally contribute toward the Commission's eventual advisory opinion.[17] Rather, field hearings add only unnecessary cost and delay to N-cases. See PR Comments at 29; Valpak Comments

[17] As examples of the value that field hearings have purportedly added to Commission proceedings, NNA lists field hearings in Docket Nos. PI2008-3 and RM2007-1. NNA Comments at 4. Unlike for N-cases, however, the Commission's governing statutes do not require public inquiries and rulemakings to be conducted on the basis of a formal evidentiary record. Compare 39 U.S.C. § 503 with 39 U.S.C. § 3661(c).

at 11. This is particularly true since the off-the-record viewpoints presented at field hearings tend simply to repeat the viewpoints that the various participants in the N-case already represent.[18] The perpetuation of field hearings would even give a false impression to participants in the hearings, who may sincerely invest significant attention and resources in hosting and attending field hearings, unaware that their efforts are barred from having any effect on the Commission's advisory opinion.

NNA cannot even devise a workable standard for when field hearings might be appropriate. NNA merely strings together a series of vague words, the precise meaning of which is anyone's guess: "a disproportionate impact … in the interior of the country," or perhaps a "disproportionate[e]ffect [on] smaller or more rural communities." NNA Comments at 5 (emphasis added). (Disproportionate relative to what? What counts as the "interior of the country"? Smaller than what? More rural than what?) NNA even appears to disagree with itself as to whether the Postal Service or field hearing proponents bear the burden of persuading the Commission that field hearings are necessary: first, NNA says that there should be a presumption that the Postal Service should have to rebut, but then NNA says that the schedule should include field hearings "[w]here participants persuasively argue" for them. Id. Such vague standards would only lead to more litigation over a meta-procedural issue, which would be a waste of time and resources considering the inability of field hearings to contribute toward the Commission's advisory opinion in any case.

[18] These already-represented viewpoints include those of NNA itself, at least in the N-case that it cites as an example. See NNA Comments at 3-4.

The Postal Service agrees with NNA on one count: the Commission should codify the circumstances that warrant field hearings. Fortunately, the Commission already has before it a proposal with clear standards for allowing field hearings when truly necessary and not disruptive to the formal work that Congress has required of an N-case. See USPS Initial Comments at 41-42. Unlike NNA's rough sketch, the Postal Service's proposal accounts, both explicitly and implicitly (in the parameters of the standard itself), for field hearings' nonexistent role in the evidentiary record on which the Commission must base its advisory opinion.

H. Back-to-Back Hearings

Valpak complains that back-to-back hearings on direct, rebuttal, and surrebuttal cases will be "unworkable," as this would require the filing of rebuttal testimony before cross-examination on the Postal Service's direct case (and likewise, *mutatis mutandis*, for surrebuttal testimony). Valpak Comments at 11.[19] Beyond being "workable," though, American culture takes for granted that a civil or criminal trial features the submission of all parties' evidence in advance of hearings, followed by back-to-back hearings to examine the evidence by both sides of a case. One suspects that most American judges would scoff at the efficiency and "workability" of drawing out a trial such that one side presents its evidence, then a hearing is held to cross-examine that side's witnesses, and then the same is done sequentially for the other side in turn, in the same manner that the Commission does for N-cases under its current rules.

[19] Mr. Popkin also makes an observation about this point, although his observation does not appear to indicate a particular opinion on the matter. Popkin Comments at 3 ("It also appears that participants will be required to file their rebuttal case and the Postal Service [its] surrebuttal case prior to the hearing on the Postal Service's direct case.").

A better word for the Commission's proposal might be "different." The Commission need not rethink this aspect of its proposed rules simply because it would be different from how the Commission has structured N-cases in the past, particularly since the Commission's proposed approach directly advances its goal of making N-cases more timely, efficient, and modern.

I. Subject-Matter Limitation

Valpak takes issue with the Commission's proposal to limit the scope of N-cases to the service change proposal at hand, rather than entertaining other participants' digressions or alternative proposals. Valpak Comments at 9-11, 12, 13. To Valpak, the Commission would be squelching participant speech, despite having "no right under the APA" to do so, and no less than the Commission's "statutory role" and the regulation of the "Postal Service monopoly" are at stake. Id. at 9, 11, 13.

It is puzzling why the Commission's proposals should provoke such hyperbole. It is beyond dispute that an agency can manage its own proceedings to ensure that submissions are relevant, do not distract from the point of the proceeding, and do not waste the agency's and participant's resources. The very fact that the APA penalizes agency action that is an "abuse of discretion," 5 U.S.C. § 706(2)(A), underscores an agency's "right under the APA" to exercise discretion in managing its proceedings in the first place. This includes the Commission's right to decide that exploration of alternative service change proposals is irrelevant to its task in N-cases: that is, evaluating whether a Postal Service's service change proposal "conforms to the policies established under" Title 39, 39 U.S.C. § 3661(c), and not whether any other conceivable service changes might also conform to those policies. See LaFleur v. Whitman, 300 F.3d 256, 280 (D.C.

Cir. 2002) (holding that Environmental Protection Administrator did not abuse discretion under APA in failing to consider alternative feedstocks for ethanol production plant, because the plan under review involved only certain feedstocks and not those alternatives); see also Hi-Tech Furnace Sys., Inc. v. FCC, 224 F.3d 781, 789 (D.C. Cir. 2000) (giving "extreme deference" under APA's abuse-of-discretion standard to agency's decision not to allow discovery into certain topics). Far from having "no right under the APA" to ensure that N-cases stick to the matter at hand, it is entirely within the Commission's legal discretion for it to do so.

Moreover, the Commission has exercised its discretion in numerous past proceedings without raising any such fuss over principle. The Commission and its Presiding Officers already make decisions about what discovery questions, portions of testimony, and even portions of briefs are and are not relevant to the subject matter of various proceedings. The Commission is also already free to give little or no consideration to non-relevant discussions in testimony or briefs when preparing its advisory opinion. The Commission's proposed rules would simply offer participants clearer guidance about what topics are and are not useful in terms of helping the Commission's eventual advisory opinion.

The point of an N-case is for the Commission to offer its expert advice on the service change that the Postal Service has placed before it. This is clear from the statute, which requires the Postal Service to submit a service change "proposal" in specified circumstances and the Commission to issue an opinion on any "proposal" that the Postal Service submits. 39 U.S.C. § 3361(b), (c). Therefore, the Commission's decision to confine an N-case to consideration of the Postal Service's proposal is fully

consistent with both Title 39 and the APA. If a participant believes that some alternative service change is a better idea, then that participant is welcome to direct his or her suggestion to the Postal Service itself (such as through pre-filing discussions).[20] A participant could even submit his or her idea to the Commission for further study in its own right, and the Commission's proposed rules would expressly provide for this. These alternative service change ideas might indeed be worth considering, but they should not be allowed to detract from the Commission's goal of more timely and efficient N-cases on the Postal Service proposals at issue in them. Far from rendering participants unable to bring alternative proposals and ideas to the Postal Service or Commission's attention, the Commission's proposed rules would formally create avenues for just that.

J. Comments in Lieu of Briefs

Out of concern for participants who may "not be conversant with legal briefing," the Public Representative proposes that the Commission create a mechanism for "comments in lieu of briefs": filings that would presumably have record status (unlike comments or "informal expressions of views" under current Rule 3001.20b) but not be subject to the formal or substantive requirements for briefs in proposed Rule 3001.93. PR Comments at 30-31. The Public Representative proposes that these comments be due on the same date as reply briefs. Id. at 32. The Public Representative also suggests that comments in lieu of briefs could be a way for participants to propose public inquiries and special studies, id., and for supporters of the Postal Service to have

[20] If the participant's suggestion to the Postal Service then leads the Postal Service to consider a different nationwide (or substantially nationwide) service change, then the Commission and other participants will then have an opportunity to evaluate it via the resulting N-case anyway.

input, since they are not nominally entitled to file a direct case and may wish to submit factual material that does not relate directly to a rebuttal case (in other words, material that would not be in the nature of surrebuttal). Id. at 15.

For various reasons, there is no need for the Commission to enshrine a right to submit comments in lieu of briefs. First of all, the elimination of "limited participator" status does not create some new stricture that requires accommodation: laypersons who intervene as limited participators under current rules must nonetheless follow the same guidelines as other parties if they wish to file briefs. 39 C.F.R. § 3001.20a(c) ("Limited participants may file briefs or proposed findings pursuant to §§ 3001.34 and 3001.35[.]"). Second, even without explicit provision in the Commission's current rules, parties have filed "comments in lieu of a brief" before the Commission on rare occasions; ironically, the only parties to have done so are ones with every reason to be "conversant with legal briefing."[21] Third, full and limited N-case participants alike, including those "conversant with legal briefing," have tended to honor current Rule 3001.34(b)'s formal brief requirements more in the breach than the observance.[22] Indeed, some of these briefs are indistinguishable in formality from the "comments in

[21] E.g., Public Representative's Comments in Lieu of Initial Brief, PRC Docket No. A2013-2 (Dec. 21, 2012); Comments of National Newspaper Association in Lieu of Initial Brief, PRC Docket No. N2011-1 (Nov. 4, 2011); Statement in Lieu of Brief by the National Newspaper Association, PRC Docket No. MC2004-5 (Nov. 2, 2004). It is also ironic that NNA was a full participant, not a limited participator, in Docket No. N2011-1.

[22] E.g., Initial Brief of the American Postal Workers Union, AFL-CIO, PRC Docket No. N2012-1 (July 10, 2012) (full participant; no table of contents or statement of proposed findings or conclusions); Douglas F. Carlson Initial Brief, PRC Docket No. N2010-1 (Oct. 15, 2010) (limited participator; no statement of proposed findings or conclusions); Initial Brief of the Greeting Card Association, PRC Docket No. N2010-1 (Oct. 15, 2010) (full participant; no table of contents); Initial Brief of David B. Popkin, PRC Docket No. N2010-1 (Oct. 15, 2010) (limited participator; no table of contents or statement of proposed findings or conclusions); Initial Brief of Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc., PRC Docket No. N2010-1 (Oct. 15, 2010) (full participant; no statement of proposed findings or conclusions).

lieu of a brief" that the Commission has docketed on occasion. This has not stopped the Commission, the Postal Service, or other participants from treating all such submissions as material worthy of some consideration as the Commission crafts its ultimate advisory opinion.

Despite the frequency of technical noncompliance with the existing briefing rules, there is value in maintaining formal standards that compel N-case participants to be clear about their views and how those views relate to the evidentiary record. Rule 3001.34(b) and proposed Rule 3001.93(b) do not impose some sort of advanced legal-sophistication test; they simply require that a participant clearly present his or her views, arguments, and proposed findings or conclusions, and that the participant clearly indicate what support he or she draws (if any) from the evidentiary record and external authorities. If the Commission were to provide an alternative, more free-form, yet equally legitimate means of submitting N-case briefs – such as comments that do not need to indicate whether particular allegations have any specific support in the record – then there would be little to stop all N-case participants from choosing the easier path, no matter how much more difficult it might make the Commission's task of evaluating the record. To be sure, the occasional comments in lieu of a brief might not draw much more objection than they have in the past, particularly if they provide indicia of reliability comparable to those in a brief. Nevertheless, the Commission's briefing standards are hardly so valueless that they deserve to be routinely undermined in proceedings where the Commission is required to base its eventual decisions on a formal evidentiary record.

Even more problematic is the Public Representative's recommendation that a participant be allowed to wait until the reply brief deadline to submit his or her "comments in lieu of a brief." One can easily imagine a participant, whether innocently or cunningly, waiting until this juncture to file what amounts to an initial brief, full of assertions and fresh arguments that other parties would no longer have an opportunity to challenge in a reply brief. If comments in lieu of a brief are to be allowed at all, it would be far better to require them to follow the same standards and timetable as initial and reply briefs. That is, comments relating to the record in general – that is, those dealing with the stuff of initial briefs – must be filed by the deadline for initial briefs, so as to give other participants an opportunity to respond to those comments in their reply briefs. Comments filed after the initial brief deadline must only relate to the initial briefs, just as reply briefs do, and should not raise new arguments. To allow otherwise, such as under the Public Representative's proposal, would either prejudice other participants' rights to respond to new arguments and allegations, or else would suggest the need for an additional round of briefing, which would cut further into the schedule for a timely N-case.

The Postal Service has already explained, in section I above, that participants are free to petition the Commission to open a public inquiry or special study into alternative service change concepts, even without special provision in the Commission's N-case (or other) rules. Parties can do this today without the Commission providing special rules to do so through "comments in lieu of a brief." Therefore, there is no need for the Commission to create such rules now. What is more, the remedy would not fit the supposed defect: it seems odd that one participant should be exempt from the same

brief guidelines as other participants simply because the former wishes to propose a public inquiry somewhere in the course of his or her brief.[23]

Finally, it is unclear why supporters of the Postal Service proposal would need some sort of special accommodation to present their views. The Postal Service is unaware of any participant in a past N-case having complained that it was unable to submit its own testimony in support of the Postal Service's direct case. For the most part, supporters have made their views known in briefs, and there is no indication that the Commission's proposed rules would alter that landscape.[24] In fact, that the Public Representative apparently sees "comments in lieu of a brief" as a remedy for an otherwise supposed inability to file testimony raises dire implications for other participants' APA rights: would the commenter be allowed to introduce new testimony at the briefing stage, long after the time has come and gone to test the reliability of that testimony through fact-finding (be it party discovery or otherwise), cross-examination, and rebuttal? The Public Representative's proposal appears to be neither so

[23] The Public Representative also proposes that participants be allowed to suggest subjects for public inquiry or special study in their reply briefs. This would leave the Postal Service and other participants without an opportunity, in the N-case itself, to offer their thoughts on the merits of such a public inquiry or special study. In such a case, however, the Postal Service expects that, if the Commission decides to open a separate docket to explore such proposed subjects, the Postal Service and other participants would then be given a chance to advise the Commission on the pros and cons of conducting such a public inquiry or special study, and the Commission could ultimately decide not to do so after all.

[24] If a supporter were intent on submitting its own testimony bolstering the Postal Service's direct case and not responding to other participants' rebuttal arguments, the supporter could theoretically seek leave to file such testimony during the rebuttal phase. After all, the supporter's testimony would presumably contain "material issues relevant to the specific proposal made by the Postal Service," per proposed Rule 3001.90(b). The only issue to overcome would be purely semantic, in that the proponent would not technically be rebutting the Postal Service's case. See AMERICAN HERITAGE COLLEGE DICTIONARY 1139 (3d ed. 1993) (defining "rebut" as "[t]o refute, esp. by offering opposing evidence or arguments"). In any event, other participants could then have a chance during the surrebuttal stage to file additional testimony exploring the supporter's quasi-rebuttal testimony.

"pragmatic" nor so "APA-compliant" an avenue as the Public Representative thinks. See PR Comments at 15. Nor is there even a need for it in the first place.

III. Other Points of Discussion

GCA raises a concern that the description of "interrogatories, by witness," in proposed Rule 3001.87(a) appears to overlook the prospect of institutional interrogatories. GCA Comments at 5. This observation is unlikely to have significant practical consequences, however. Given the well-established use of institutional discovery, it is difficult to conceive of the abolition of institutional discovery as the Commission's unspoken intent, nor of the Postal Service objecting (much less successfully) to institutional interrogatories based on such a technicality. Thus, the proposed rule text probably would not work any of the dramatic results of which GCA warns.

While the Postal Service does not think that further change is necessary, the Postal Service also finds nothing wrong with the Commission making its intent clearer. The Commission could handily do so while clarifying that the "by witness" language speaks only to the organization of interrogatories. See USPS Initial Comments at 35.[25] The Commission could amend the relevant phrase in proposed Rule 3001.87(a) to read along the lines of "organized by witness (and institutional respondent, where appropriate)."

[25] GCA appears to agree with the Postal Service's interpretation. GCA Comments at 5 ("[U]nder the proposed rule, interrogatories must be captioned 'by witness[.]'" (emphasis added)).

IV. Conclusion

Many of the points and recommendations that other commenters have made bear serious consideration by the Commission. The Postal Service urges adoption of these recommendations, along with others in the Postal Service's initial comments.

Some proposals, however, are aimed at problems not actually posed by the proposed rules (such as the supposed need to notify "potentially affected persons" of an impending pre-filing conference or to let participants file "comments in lieu of briefs"), or problems that the Commission could address in a far simpler and less problematic manner than what the commenter has in mind (such as proposals to create a "conditional acceptance phase," to restart the 90-day clock in all cases with an incomplete or modified service change proposal, or to suspend the clock for surrebuttal). Still other commenter proposals (such as unlimited follow-up interrogatories, a new category of discovery for interrogatories that seek the production of data, and objections to back-to-back hearings and subject-matter limitations) seem to have arisen in a vacuum, as if the Commission's own experience and that of federal courts provided no guide as to what can and cannot work. The Commission would be in better stead if it heeded that experience in favor of adopting the pertinent commenter proposals into its final rule.

The Postal Service respectfully submits the comments above for the Commission's consideration.

Respectfully submitted,

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